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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 GG Insurance Services Incorporated,

No. CV-23-01964-PHX-KML

10 Plaintiff,

ORDER

11 v.

12 Myles Johnson, et al.,

13 Defendants.
14

15 The parties have three more discovery disputes.

16 **I. Response to RFP #45**

17 GG propounded a request for production asking defendants to “produce all
18 Documents, ESI and things reflecting revenue received from Your use of” source code.
19 Defendants initially responded that no such documents existed but later stated Turbo “does
20 not generate revenue from its source code; therefore, Turbo’s response to this request will
21 not be supplemented.”

22 The dispute turns on the proper interpretation of the RFP. GG argues the RFP seeks
23 all the documents showing revenue from “*use* of the code, not from the mere existence of
24 the code.” (Doc. 149 at 2.) According to GG, the code is used to help sell homeowners’
25 insurance, and documents showing revenue from such sales—which GG claims must
26 exist—would be responsive to the RFP. Turbo, however, interprets the RFP differently and
27 argues there are no responsive documents because “Turbo does not generate revenue from
28 its source code.” (Doc. 149 at 5.) In other words, Turbo seems to have interpreted the RFP

1 as seeking only those documents indicating revenue directly from source code, such as
2 from the sale or licensing of the source code itself.

3 Turbo's interpretation of the RFP is too restrictive. The RFP seeks revenue derived
4 from the "use" of the code. Responsive documents would include those that outline sales
5 where the source code was used in making those sales. Assuming it is not duplicative of
6 discovery already provided, Turbo must supplement its response to this RFP.

7 **II. Privilege Log**

8 GG believes defendants should be required "to identify who the 'client' is in their
9 privilege logs when they claim attorney-client privilege." (Doc. 149 at 3.) GG argues it
10 needs this information to assess the merits of the privilege claims, in particular whether the
11 privilege has been waived. Defendants do not explain why they are resisting disclosure of
12 the client, although they seem to argue the relevant client was "Turbo." (Doc. 149 at 6.)

13 A privilege log must "describe the nature of the documents, communications, or
14 tangible things not produced or disclosed—and do so in a manner that, without revealing
15 information itself privileged or protected, will enable the other parties to assess the claim."
16 Fed. R. Civ. P. 26(b)(5)(A). Often a privilege log will include "the attorney and client
17 involved." *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). And "the
18 identity of the client, the amount of the fee, the identification of payment by case file name,
19 and the general purpose of the work performed are usually not protected from disclosure
20 by the attorney-client privilege." *Clarke v. Am. Com. Nat. Bank*, 974 F.2d 127, 129 (9th
21 Cir. 1992). Defendants have not established any reason why withholding the identity of the
22 client is necessary and disclosing the client will provide additional information to allow
23 GG to assess the privilege claim. Defendants must supplement their privilege log to include
24 the identity of the client.

25 **III. Deposition of Attorney Jessica Miller**

26 GG wishes to take the deposition of defense counsel Jessica Miller, asserting the
27 deposition is needed based on defendants' counterclaim that there is "an enforceable
28 separation agreement between GG and defendant Johnson based only on emails sent and

1 received by Jessica Miller.” (Doc. 149 at 4.) GG seeks to depose Miller “on issues about
2 intent, contract formation, course of dealing, and more.” (Doc. 149 at 4.) Defendants
3 respond GG cannot meet the high standard for allowing depositions of opposing counsel.
4 According to defendants, GG can obtain the evidence it seeks through avenues other than
5 deposing Miller.

6 The Ninth Circuit has not yet established “a standard for analyzing whether to
7 permit the deposition of counsel in a pending litigation.” *Torrey Pines Logic, Inc. v.*
8 *Gunwerks, LLC*, No. 19-CV-02195-H-DEB, 2020 WL 6365430, at *2 (S.D. Cal. Oct. 29,
9 2020). But district courts in the Ninth Circuit often rely on the “three-part test set forth in
10 the Eighth Circuit’s decision in *Shelton v. American Motors Corp.*,” 805 F.2d 1323 (8th
11 Cir. 1986). That test allows for a deposition if “(1) no other means exist to obtain the
12 information than to depose opposing counsel; (2) the information sought is relevant and
13 nonprivileged; and (3) the information is crucial to the preparation of the case.” *Id.* at 1327.

14 The Second Circuit has rejected the Eighth Circuit’s standard and adopted a more
15 holistic approach. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir.
16 2003). That approach requires a court “take[] into consideration all of the relevant facts
17 and circumstances to determine whether the proposed deposition would entail an
18 inappropriate burden or hardship.” *Id.* Appropriate considerations “include the need to
19 depose the lawyer, the lawyer’s role in connection with the matter on which discovery is
20 sought and in relation to the pending litigation, the risk of encountering privilege and work-
21 product issues, and the extent of discovery already conducted.” *Id.*

22 The court need not determine which test, if either, is appropriate. Regardless of
23 which test applies, the circumstances of the present case establish a deposition of Jessica
24 Miller is not appropriate. Defendants convincingly argue there are a variety of other
25 avenues for GG to obtain the information it seeks. With such easily available alternatives,
26 deposing defense counsel would introduce unnecessary complications.

27 Finally, the case management order issued in May 2024 required all “non-expert
28 depositions” be completed no later than January 31, 2025. (Doc. 56 at 2.) On January 21,

1 2025, the court granted a stipulation between the parties that extended that deposition
2 deadline but only for identified individuals. Jessica Miller was not one of the individuals
3 listed. Defendants argue any deposition of Jessica Miller would be untimely. GG responds
4 it is “preposterous” to think the case management order applies to discovery regarding the
5 counterclaims. The court does not issue separate case management orders for discovery
6 related to claims and counterclaims. The deadline for non-expert depositions has expired.
7 The deposition of Jessica Miller, if not prohibited for other reasons, would be barred by
8 the governing case management order.

9 **IT IS ORDERED** the parties shall comply with the discovery rulings set forth
10 above.

11 **IT IS FURTHER ORDERED** the Motion for Leave to File Non-Convertible
12 Video (Doc. 153) is **GRANTED**. Defendants shall file the video pursuant to the
13 requirements set forth in the Electronic Case Filing Administrative Policies and Procedures
14 Manual.

15 **IT IS FURTHER ORDERED** the Motion to Seal (Doc. 144) is **GRANTED**. The
16 Clerk of Court shall file under seal the documents lodged at Doc. 145. This order shall not
17 be sealed.

18 Dated this 6th day of March, 2025.

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22 **Honorable Krissa M. Lanham**
23 **United States District Judge**
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